



North Dakota Attorney General's LAW REPORT

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SEARCH AND SEIZURE - CONSENT

In *State v. Odom*, 2006 ND 209, 722 N.W.2d 370, the court reversed the district court's order suppressing evidence found in a hotel room safe.

The defendant was taken into custody on a two-year old arrest warrant outside of a hotel where the defendant had been staying. While waiting for a patrol vehicle and before reading *Miranda* rights, an officer spoke with the defendant about the arrest warrant, the defendant's hotel room number, and whether there were other individuals staying in that room. After *Miranda* rights were read, and although having initially denied it, the defendant was asked about and admitted to the presence of narcotics in the room. The defendant gave consent for an officer to search the hotel room. No limitations were placed upon the scope of the consent.

Upon searching of the room, an officer found a piece of paper with a known drug dealer's name and phone number written on it and asked the defendant for access to the hotel room's safe. The defendant stated he did not have the key so a master key was obtained from the hotel manager. The defendant did not withdraw his consent to search the room and, inside the safe, a digital scale with cocaine residue, cash, and crack cocaine was found.

The district court found that although the defendant consented to the search of the room, he retained an expectation of privacy in the safe because he did not give specific consent to search the safe. The court suppressed the evidence found in the locked safe.

In reversing the district court, the court recognized that the scope of an individual's consent is determined by considering what an objectively reasonable person would have understood the consent to include. The reasonableness inquiry is applied to the understanding of an officer who is conducting a search. Whether a search exceeds

the scope of consent is a factual question subject to the clearly erroneous standard of review.

Odom provided consent to search the hotel room. This consent allowed the officer to search the room without a warrant and was not limited. An objectively reasonable officer would have thought the defendant's unlimited consent extended to any closed or locked container located in the room. The officer reasonably believed the defendant's consent included the safe. Specific consent to search every container is not needed when the consent to search a room is given. Requiring such detailed consent would dictate that police officers inventory a room for every possible item for which a specific consent is needed and then ask for specific consent to search each item. The court was not willing to impose this burden on North Dakota law enforcement.

The scope of the search is generally defined by its expressed object. When determining reasonableness, a court will consider what the parties knew at the time to be the object of the search.

The defendant knew the expressed objects of the officers' intended search were narcotics because the officer repeatedly asked the defendant about the presence of narcotics in the hotel room. The defendant admitted there were narcotics in the room and gave consent to search specifically for narcotics. There was no doubt as to the expressed object of the search. Because narcotics were the expressed objects of the search, the officers' search of a locked safe in which narcotics were likely to be hidden was reasonable.

A reasonable person may be expected to know that narcotics are generally carried in a container. A search is conducted within the scope of consent when there is a failure to object to a continuation of the search. If a defendant's consent would

reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.

The defendant did not withdraw or limit his consent to search the hotel room. The defendant could have prevented the officer from searching

the safe by indicating that his consent did not extend to the safe. Despite ample opportunity, the defendant did not do this. With no limitations placed on the search, the officer reasonably understood the consent to extend to the locked safe.

ALIBI DEFENSE - TESTIMONY OF CHILD VICTIMS - CONTEMPT

In *State v. Seigny*, 2006 ND 211, 722 N.W.2d 515, the court affirmed the defendant's conviction of gross sexual imposition.

A seven-year-old girl told her first grade teacher that the defendant had sexual contact with her. As a result of a subsequent interview with a forensic interviewer, it was learned that another seven-year-old child also may have been sexually abused by the defendant. This child was interviewed by a licensed social worker and another forensic interviewer, and then examined by a physician.

The defendant was charged with two counts of gross sexual imposition regarding his conduct with the two young girls. Before trial, the state moved for the admission of both children's out-of-court statements under N.D.R. Evid. 803(24). At a hearing on the motion, numerous individuals testified regarding the statements. The videotaped interviews of the children were played for the court, and the court granted the state's motion to allow the school teacher, two forensic interviewers, a social worker, and both of the children's therapists to testify to the out-of-court statements.

At the jury trial, the children both testified but gave limited testimony. Both girls confirmed they had been sexually abused by the defendant. The jury was shown the children's interviews and the witnesses testified about the statements the girls made to them.

During trial, the defendant attempted to raise an alibi defense for the date of one of the alleged incidents. The court granted the state's motion to deny admission of alibi evidence because no notice was given under N.D.R. Crim. P. 12.1.

After his conviction, the defendant claimed that his due process rights were violated because the court did not allow him to testify about this alibi.

A trial court decision to exclude evidence of an alibi under Rule 12.1 is reviewable under the abuse of discretion standard. The defendant claimed he was not at home during the time period of one event because he was working as a truck driver and out of town. However, the defendant did not make a formal offer of proof to support his claim and he did not provide notice of an alibi defense under Rule 12.1. The court concluded the defendant failed to comply with the notice requirement of Rule 12.1 and he therefore was not entitled to present evidence of an alibi defense. The court also concluded that the defendant had notice of the allegations of the dates when the alleged conduct occurred and did not have good cause for his failure to give notice of his intent to raise the alibi defense.

The district court had discretion to exclude the evidence after considering the prejudice that would occur if the evidence was allowed and whether the defendant's failure to give notice was for good cause or in good faith. The trial court did not abuse its discretion excluding the alibi evidence.

The court also rejected the defendant's claim that the trial court abused its discretion in admitting into evidence testimony about the children's out-of-court statements under N.D.R. Evid. 803(24). He also claimed a violation of a Sixth Amendment right to confront his accuser. On a review of the record, the court concluded that while the district court could have given a more detailed explanation of its decision its findings were adequate and there was sufficient information from the pretrial hearing to support the court's decision.

In rejecting the defendant's Sixth Amendment confrontation claim, the court noted that in this case, both of the child victims testified at trial and the defendant had the opportunity to cross examine both children. No Sixth Amendment rights were violated.

During closing argument, the trial court found the defendant's attorney in contempt in front of the jury. The state objected on numerous occasions to the defendant's attorney's arguments. The attorney addressed two members of the jury by name and this objection was sustained. A second objection by the state was sustained when the defense attorney made references to his personal background that were not facts in evidence. Other objections were made to arguments and after the fifth objection was sustained, the attorney was warned that he could not voice his personal opinion. Later in the argument, the court again warned the attorney that he would be in contempt if he continued to mention his personal opinion or his disagreement with the court. After receiving the judge's warning, the attorney asserted that the conduct of social services bordered on abuse. The judge then held the attorney in contempt and fined him \$500.

Intentional disobedience of a court order constitutes contempt and absent a showing that an order is transparently invalid or frivolous, the order must be obeyed until stayed or reversed by

orderly review. The court ordered the attorney not to give his personal belief during his closing argument and the order was not transparently invalid or frivolous. The court warned the attorney that if he continued disobeying its order to refrain from giving his personal opinion, he would be held in contempt. After the attorney intentionally disregarded the court's order, the court found him in contempt. The trial court did not abuse its discretion in finding the defendant's attorney in contempt of court.

Any prejudicial effect the court's order may have had can ordinarily be cured with an instruction to the jury that the attorney's sanction should not affect the jury's consideration of the evidence or whether the state has met its burden of proof. Although the trial court did not give the jury a curative instruction, the defendant did not explain how the court's contempt decision prejudiced the jury against him. The attorney was found in contempt during the closing argument and the court's decision did not limit the presentation of evidence.

SEARCH AND SEIZURE - FRANK'S HEARING

In *State v. Ebel*, 2006 ND 212, 723 N.W.2d 375, the court affirmed the defendant's conviction of possession of a controlled substance and paraphernalia.

Based upon testimony of an officer and information received from other officers, neighbors of the defendant, and city officials regarding what appeared to be drug activity and the potential presence of a methamphetamine laboratory a search warrant was obtained to search the defendant's residence. A motion to suppress was denied by the trial court but, prior to trial, the defendant raised a potential Frank v. Delaware, 438 U.S. 154 (1978) issue and was permitted to file a motion seeking a Frank hearing and a request for reconsideration of his motion to suppress. Under Frank, the Fourth Amendment requires a hearing be held at the defendant's request if a defendant makes a substantial preliminary showing that knowingly, intentionally, or with reckless disregard for the truth, a false statement was made in the warrant affidavit and if the allegedly false statement was necessary to the finding of probable cause.

The district court denied the defendant's motion to reconsider probable cause and denied the request for a Frank's hearing.

Whether probable cause exists to issue a search warrant is a question of law. The court will use a totality-of-the-circumstances test in reviewing the sufficiency of information before the magistrate, independent of the court's decision. To establish probable cause, there must be a nexus between the place to be searched and the contraband sought. Circumstantial evidence may be used to establish that nexus. Probable cause exists when there is a fair probability contraband or evidence of a crime will found in a particular place. Mere suspicion that criminal activity is taking place, which may warrant further investigation, does not rise to a level of probable cause to search.

The court recognized that citizen informants are presumed to be a reliable source of information. If possible, this reliability should be evaluated and verified by independent police investigation. If the information presented to the magistrate demonstrates conduct or activity of a protracted and continuous nature, the passage of time is less important to the validity of the probable cause.

Drug dealing is intrinsically a protracted and continuous activity.

Examining the officer's testimony prior to issuance of the search warrant, the court concluded there existed a fair probability a methamphetamine lab would be found in the defendant's house. The magistrate had sufficient probable cause to issue a search warrant for the defendant's residence.

The defendant argued that the district court erred in denying his request for a Frank's hearing. The affidavit, or in this case telephonic testimony, must contain truthful statements. A false statement under Frank is one that misleads a neutral and detached magistrate into believing the stated facts exist and those facts in turn affect the magistrate's evaluation of whether or not there is probable cause. That standard may also apply to statements which are deliberately false or misleading by omission. However, for an omission to serve as the basis for hearing under Frank, it must be such that inclusion in the affidavit would defeat probable cause.

A Frank's hearing is required only if a defendant makes a substantial preliminary showing, accompanied by an offer of proof, that false statements were made in support of the search warrant, either knowingly or intentionally, or with

reckless disregard for the truth, and the allegedly false statements were necessary to a finding of probable cause. No evidentiary hearing is required if there remains sufficient evidence to support a finding of probable cause without the allegedly false statements. Allegations that false statements were negligently or innocently made are insufficient to necessitate an evidentiary hearing.

The allegations of false statements must clearly delineate which statements are claimed to be false and should be accompanied by a statement supporting the reason the statements are believed to be false. Affidavits or other reliable nonconclusory statements of witnesses should be furnished or the absence of such support satisfactorily explained. The defendant's burden of proof necessary to make a threshold showing is something less than a preponderance of the evidence.

Upon review of an affidavit supporting the defendant's motion and the information provided by the officer for the search warrant, the court concluded that the defendant did not make a substantial preliminary showing requiring an evidentiary hearing under Frank and the trial court did not commit error in denying that hearing.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - VIENNA CONVENTION ON CONSULAR RELATIONS

In *Rummer v. State*, 2006 ND 216, 722 N.W.2d 528, the court affirmed the denial of Rummer's petition for post-conviction relief.

Rummer, formerly known as Werner Kunkel, was found guilty of murder in 1995. In his post-conviction relief petition, he argued that his trial counsel was ineffective in failing to adequately investigate various forensic and scientific evidence offered by the state.

A defendant must offer evidence that any additional witnesses would have aided the defense's claims. The court will not second guess matters of trial tactics on appeal. Strategic choices by trial counsel made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. The court will not superimpose its collective judgment upon that of a trial counsel's decision as to whether a witness should testify. A trial counsel's failure to have a critical witness testify, coupled with other

errors by trial counsel, may result in ineffective assistance of counsel. The petitioner must identify with specificity or particularity how and where the trial counsel was incompetent, and the probable different result.

The trial court found that any failure to further investigate evidentiary and scientific issues and bring forward testimony of an independent forensic and follow-up alibi witnesses would not have avoided other substantial evidence. The district court thoroughly examined the testimony regarding Rummer's confessions and statements against interest finding the common thread that tied them together was that Rummer admitted to killing or participating in the victim's homicide with details accurately depicting the circumstances or corroborating events surrounding the murder. Rummer did not demonstrate how the testimony of any of his proposed additional witnesses would have changed the result in his criminal trial. Rummer was not prejudiced by counsel's alleged

deficient performance and failed to establish ineffective assistance of counsel.

The court rejected a Brady v. Maryland, 373 U.S. 83 (1963), claim that the state failed to provide evidence relating to a sworn statement of an individual who had overheard a conversation indicating a victim had been killed by a law enforcement officer. The district court found that the sworn statement was hearsay, speculative, and lacked credibility, particularly in terms of detail. Even without disclosure of the statement, the underlying claim that the victim had been killed by another person was well known and the defendant and his trial counsel were well aware of the rumors relating to this allegation. Exhibits and police reports containing variations of the claim had been provided to Rummer prior to trial and the additional sworn statement made by an individual in an earlier and unrelated proceeding would not have made any probable difference in the outcome of the case. Rummer failed to establish that the sworn statement would have been favorable to him considering what had already been provided and was known at the time of trial, or that the outcome of the proceedings would have been different even if the evidence had been disclosed.

The court also rejected Rummer's claims the state violated his rights as a German national to have assistance of the German Consulate General as provided by Article 36 of the Vienna Convention on Consular Relations.

The district court found that Rummer had been raised and educated in the United States and in North Dakota since his early childhood, was fluent in English, was familiar with the North Dakota criminal court system based upon his many prior criminal convictions and prosecutions, and that he had assigned legal counsel and was not denied access to legal advice or assistance. None of the services or benefits which could have been provided by the German Consulate were relevant to Rummer's circumstances and the absence of the services demonstrated no prejudice to Rummer. The district court also questioned Rummer's credibility on this issue because he was the only one that actually knew he was a foreign national.

Rummer did not raise his claims under the Vienna Convention in his prior criminal trial or in his previous direct appeal. The court concluded that Rummer was precluded from raising the issue in his post-conviction proceeding.

POST-CONVICTION RELIEF - 85% RULE - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Sambursky v. State*, 2006 ND 223, 723 N.W.2d 524, the court affirmed and reversed, in part, an order denying an application for post-conviction relief.

Sambursky pled guilty to several counts of gross sexual imposition. The district court rejected the initial plea agreement and an amended plea agreement was reached. Sambursky again agreed to plead guilty to the charges. Under the terms of the amended plea agreement, the state agreed to recommend that Sambursky be sentenced to a total of not more than 30 years incarceration with an additional 50 years suspended. The agreement expressly allowed Sambursky to present testimony and argument requesting a downward departure from the 30-year recommendation.

The district court accepted Sambursky's guilty pleas under the amended agreement and sentenced him to 30-years incarceration with the additional 50 years suspended.

Sambursky applied for post-conviction relief alleging his guilty plea was not entered voluntarily because he did not fully understand the consequences of his plea and he received ineffective assistance of counsel.

He first asserted his guilty plea was not made knowingly and voluntarily because the district court did not advise him that the violent nature of some of his crimes under N.D.C.C. § 12.1-32-09.1 he would be required to serve 85% of the sentence imposed. He claimed that the 85% rule was a mandatory minimum sentence that must be disclosed to the defendant under N.D.R. Crim. P. 11 before a guilty plea is accepted.

Rejecting this claim, the court noted that it had previously held that the statutory 85% service requirement was imposed as a condition of parole and was not a mandatory minimum sentence requiring disclosure by the district court under Rule 11. The 85% service requirement does not

require any minimum sentence but it does require service of 85% of any incarceration sentence before parole eligibility. Failure to advise the defendant of the implications of the 85% service requirement does not affect the voluntariness of the plea. The district court did not commit error in finding Sambursky's guilty plea was knowingly and voluntarily made.

However, Sambursky was entitled to a hearing on his application for post-conviction relief, precluding any summary dismissal of his ineffective assistance of counsel claim. Sambursky argued that his attorney was ineffective because he provided misinformation about the length of time he would serve in the state penitentiary under the plea agreement. If Sambursky's assertions are taken as true for summary dismissal purposes, his attorney committed a serious error by misinforming him of the effects of the law. In this case, Sambursky claimed that his attorney told him that he would only serve 8 - 10 years of his 30-year sentence and that his attorney claimed to have researched the issue and contacted the parole board to support his position. These assertions, if taken as true, under the court summary judgment jurisprudence, indicates that Sambursky's attorney actively misinformed him of the length of time he would serve under the plea agreement.

The actual time a defendant will serve and the defendant's parole eligibility could be important factors in considering a plea agreement. Sambursky's affidavit raised an issue of material facts regarding whether he was asking about the actual time he would serve under a plea agreement when he discussed the matters with his attorney or whether his attorney's advice was objectively deficient when the attorney advised him of the length of time he would actually serve. Sambursky is entitled to an evidentiary hearing. If a hearing establishes that the assertion in his affidavit are correct, Sambursky's attorney fell below the standard of reasonable assistance when he actively misinformed his client about the effects of the law. A genuine issue of fact existed under the "performance" prong of the Strickland v. Washington analysis.

Sambursky's affidavit in support of petition also raised an issue of fact under the "prejudice" prong of Strickland v. Washington, because he asserted he was induced into pleading guilty based on the erroneous advice of his attorney. He claimed that, but for counsel's statements misinforming him of the effect of the law, he would not have entered into the plea agreement and would have insisted on going to trial. As a result, he was entitled to an evidentiary hearing on this issue.

ARREST OF JUDGMENT

In *State v. Just*, 2006 ND 225, 723 N.W.2d 541, the court affirmed the district court's order denying the defendant's motion to arrest his judgment under N.D.R. Crim. P. 34.

The defendant was convicted by a jury of surreptitious intrusion for hiding a video camera in the bathroom/laundry of his home in secretly recording several females changing their clothes. The charging language in the complaint followed most of the statutory language for the crime but failed to allege the recording device was used through the window or other aperture of a place where a reasonable individual would have an expectation of privacy.

Before trial, the defendant submitted his requested jury instructions with a more exacting definition of surreptitious intrusion. He argued that the omitted language of the complaint, "window or other aperture", was an essential element of the offense and requested the jury instructions include the omitted phrase. The court agreed and

instructed the jury as requested. The complaint was not amended to include this language.

After the guilty verdicts, the defendant filed a motion to arrest judgment under N.D.R. Crim. P. 34. The motion was denied.

On appeal, the defendant argued that the omitted language in the complaint constituted an essential element of surreptitious intrusion and the trial court committed error when it refused to arrest judgment under Rule 34 because the complaint did not specifically allege the recording was made through the "window or other aperture." In rejecting this claim, the court concluded that even if the trial court erred in holding the phrase was not an essential element, the error was harmless.

The purpose of a complaint or information is to inform the accused of the charges against him to enable him to prepare for trial. There is nothing in the record to suggest the defendant was not informed of the crime charged or that he was

unprepared for trial. The defendant's trial conduct shows he was fully aware of the "window or other aperture" phrase. The effect of arresting judgment under Rule 34 is to place the defendant in the same situation he was before the information was filed. An individual may be reprosecuted under a new information as if there had been no prior proceedings. The state could amend the complaint to contain the "window or other aperture" phrase and retry the defendant. As demonstrated by the jury verdict reached after consideration of the phrase omitted from the

complaint, a retrial following an amended complaint would not change the result. The error would be harmless. The defendant was aware of the statutory elements, was afforded adequate opportunity to prepare for trial, the court properly instructed the jury on the law, and the defendant was allowed to argue the state failed to prove the window or other aperture element in his closing arguments. Even if the phrase was an essential element, a decision the court did not make, the failure to allege it in the charging document was harmless under N.D.R. Crim. P. 52(a).

FIREARM POSSESSION BY A FELON - MISTAKE OF LAW

In *State v. Buchholz*, 2006 ND 227, 723 N.W.2d 534, the court affirmed the defendant's conviction of two counts of possession of a firearm by a felon.

In 2002, the defendant pled guilty to a felony NSF check offense. A year later, while executing a search warrant, law enforcement found a rifle and a shotgun under a bed in the defendant's home. After preliminary hearing, the district court discharged the defendant finding there was not probable cause to believe he committed a crime because his felony conviction of issuing a check without sufficient funds was immediately reduced to misdemeanor when he was sentenced to less than one year in prison. In an earlier appeal (*State v. Buchholz*, 2005 ND 30, 692 N.W.2d 105), the court reversed and remanded the district court's order discharging Buchholz concluding that a person convicted of a felony and sentenced to not more than one year, despite the immediate reduction to a misdemeanor conviction, is still initially convicted of a felony.

After that appeal, the defendant was charged with two more counts of possession of firearms by a felon. The two new counts were based on firearms officers seized during the search of a residence and a motor home parked on the property. The search arose out of the same factual situation and occurred on the same day as the search in the previous charge. The state filed separate motions in limine asking the court to exclude testimony or evidence that the defendant relied on a mistake of law in owning or otherwise possessing a firearm. These motions were granted.

The court will review a district court's decision on a motion in limine for an abuse of discretion. Mistake of law is an affirmative defense asserted

when a person has a good faith belief that his conduct does not constitute a violation of the law and he acted in reasonable reliance upon a statement of law contained in a judicial decision, opinion, order, or judgment.

The defendant claimed that the prior Supreme Court decision instructed the district court to consider a mistake of law defense during his trial. This argument was based upon whether the defendant could assert an affirmative defense to overcome a charged defense during a preliminary hearing and reference was made to a mistake of law defense in that earlier opinion.

The court noted that the issue in the defendant's prior appeal was not whether a mistake of law defense was applicable but whether an affirmative defense could be asserted at a preliminary hearing to dismiss the case. An affirmative defense could not be asserted at a preliminary hearing to overcome a charge because a preliminary hearing is not held to determine guilt or innocence. The place for such an assertion was at trial. Whether a mistake of law defense was applicable in this case was not the legal question before the court in the prior appeal and no instruction was given to the district court to allow the evidence of the defense at trial.

A mistaken belief of the law is rarely available as a defense and, when the offense is a strict liability offense, a mistake of law defense is generally precluded because the offense does not contain a culpability requirement.

The offense of felon in possession of a firearm is a strict liability offense and therefore a mistake of law defense is generally precluded. Only in rare cases has the court said an affirmative defense

may be applied when the offense is a strict liability offense.

The defendant admitted that ignorance of the law was not an excuse. He did claim, however, the district court ordered an illegal sentence in the underlying NSF check felony was the basis of the possession of firearms charges, which was a mistake of law. He claimed his original sentence on the initial felony was illegal because the court ordered that he not possess a firearm for a period of one year, an order contrary to N.D.C.C. § 62.1-02-01(2) that imposes a five year prohibition of firearm possession.

In reviewing the record of the sentencing, the court noted the defendant might be correct and there might be a mistake of law if the district court judge had said that N.D.C.C. § 62.1-02-01(2) did not apply to the defendant because his felony conviction was reduced to a misdemeanor. However, at sentencing the district court did not

address whether that section applied but only the conditions the defendant would be required to abide by while on probation. The court did not address whether the defendant could possess or own a firearm after probation and the defendant admits the district court was not required to inform him of all the collateral consequences of his felony conviction. The court found no conflict between the district court's sentence and N.D.C.C. § 62.1-02-01(2). The district court's sentence was not illegal.

The court also specifically noted that N.D.C.C. § 62.1-02-01 defines a conviction for purposes of that section and the prohibition against the possession of a firearm by a felon applies when a felony conviction has been reduced to a misdemeanor. Although the defendant may have misinterpreted the district court's comments during sentencing, the court's sentence was not illegal and the defendant was not entitled to rely on a mistake of law defense.

SEARCH AND SEIZURE - AUTOMOBILE EXCEPTION

In *State v. Doohen*, 2006 ND 239, 724 N.W.2d 158, the court reversed the trial court's order suppressing evidence found during a search of the defendant's vehicle.

A highway patrol trooper received a dispatch about a vehicle that was being driven erratically on the interstate. The trooper responded to the call and stopped the vehicle. The defendant, who was the driver, stated he was driving erratically because of problems with his tires.

The trooper suspected the defendant was driving under the influence but did not detect signs of alcohol consumption to substantiate his suspicion. He did notice a tote bag next to the defendant on the front passenger seat that contained butane lighters and syringes. The trooper did not notice whether the syringes were medicinal or hypodermic syringes but he knew, based upon his training and experience, that butane lighters are frequently used in drug production and syringes are often used to inject drugs.

The trooper took the defendant to his patrol car and asked him about the items in the tote bag. The defendant indicated the syringes were used to spray water and that he did glass blowing and glass sculptures. The defendant did not consent to a search of the vehicle.

The trooper placed the defendant in the backseat of the patrol vehicle, waited for another officer to arrive at the scene, and then searched the vehicle. Items in the tote bag caused them to call the K-9 unit. During the search, a metal tray with residue on it was found in the tote bag and it was determined to be methamphetamine. In addition, a machete was found covered by sleeping bag. Photographs were taken of the tote bag at the scene, but the tote bag was not presented as evidence because it was returned to the defendant's mother, the syringes were not sent to the State Laboratory because it does not accept unused items, and the butane lighters and syringes were disposed of and therefore were unavailable for the suppression hearing.

The trial court granted the defendant's motion to suppress, finding the state did not establish probable cause to search the vehicle.

In reversing the trial court's order, the court noted the trooper was trained to identify drug paraphernalia. Drug paraphernalia includes hypodermic syringes, needles, and other objects used, intended for use, or designed for use to inject controlled substances into the human body.

Although the trooper may not have been certain the syringes were for drug use, when combined with the butane lighters they were enough to

warrant a belief that they may be drug paraphernalia and evidence of drug activity. The trooper used his training and experience to conclude that the butane lighter and syringes were probably connected with criminal activity.

When determining whether there is probable cause, the evidence should not be considered individually but as a collective whole. Although the defendant's statements about spraying water and blowing glass alone may not have constituted probable cause, those statements were layers which contributed to the totality-of-the-

circumstances that resulted in probable cause. The trooper's suspicions raised by the statements was reasonable. Although there may have been an innocent explanation for why an individual has butane lighters or syringes, when the items are together and known to be used for the production use of drugs they are sufficient to establish probable cause. A reasonable person in the trooper's position would have concluded that there was probable cause to search the defendant's vehicle. The evidence found was admissible under the automobile exception to the warrant requirement.

SEARCH AND SEIZURE - INVESTIGATORY STOP

In *State v. Oliver*, 2006 ND 241, 724 N.W.2d 114, the court affirmed the defendant's convictions of possession of a controlled substance with intent to deliver, possession of drug paraphernalia, driving under suspension, and fleeing a police officer.

An undercover officer had the defendant under surveillance after an informant reported a suspicious hand-to-hand exchange taking place at a local business. The officer did not observe any drug related activity but did notice that the defendant's vehicle lacked license plates and had what appeared to be a faded and illegible temporary registration sticker. The officer testified she would have stopped the defendant's vehicle to check the registration if she had been driving a marked law enforcement vehicle with a light bar. Instead, the officer called uniformed patrol officers with information about the car and its direction of travel, telling the officers they would have to make their own decision regarding a stop.

A uniformed officer responded to the call. As he was driving behind the defendant's vehicle he noted the lack of license plates and possible violation of North Dakota vehicle registration laws. He also saw what appeared to be a faded paper thirty-day temporary registration sticker on the rear window of the car. Because of the faded sticker and the fact the writing on it was not visible, the officer turned on his lights to initiate the stop when both cars were stopped at a yield sign. The defendant did not immediately stop, but drove into a nearby convenience store parking lot, left his vehicle, and fled into the store even after he was commanded to stop.

The police department's K-9 unit was called to perform an exterior sweep of the defendant's car and, when the dog indicated a hit, the officer's

searched the vehicle finding methamphetamine and a scale.

The defendant claimed that the stop of the vehicle was pretextual and unconstitutional.

In rejecting the defendant's claim, the court noted that traffic violations, even if pretextual, provide a lawful basis to conduct an investigatory vehicle stop. A police officer's subjective intentions in making a stop are not important as long as a traffic violation has occurred.

The uniformed officer observed the vehicle lacking license plates in possible violation of North Dakota law. Although North Dakota law allows for a temporary paper certificate to be displayed on a vehicle while a title application is being processed, it is valid for only thirty days from the date of the application. The faded temporary registration certificate with no visible printing was indicative of a temporary certificate that was more than 30 days old and constituted an objective fact giving the officer the right to stop the defendant to check its validity. The defendant also argued that the officer made the stop only after receiving information from an undercover narcotics task force detective who surveilled the defendant for a possible drug related exchange at a car wash. He argued this was not enough basis for a stop and also that displaying a faded temporary vehicle registration was not unlawful.

In this case, the uniformed officer personally observed a possible vehicle registration violation, thereby making the stop constitutional. Because the defendant fled when officers commanded him to stop, the subsequent searches of the defendant and the vehicle were incident to his arrest for fleeing a peace officer. The district court properly

refused to suppress the evidence obtained in the

searches of the defendant and his vehicle.

ARGUMENT OF PROSECUTOR

In *State v. Myers*, 2006 ND 242, 724 N.W.2d 168, the court affirmed the defendant's convictions of three drug related offenses.

The defendant was taken into custody at a motel during the search of a room occupied by him and his wife pursuant to a search warrant. The defendant indicated at the motel that he wanted to cooperate and, after having been given his Miranda rights at the police department, he again stated he wanted to cooperate with the police. The defendant provided information about other drug deals and individuals involved with those drug deals. Drugs, paraphernalia, and cash were found in the motel room or in the possession of his wife, who was present when the search warrant was executed.

The defendant did not testify at trial. During closing argument, the prosecutor made reference to whether the defendant had made statements at the motel disclaiming any connection with the room other than as a visitor. An objection was made by defendant's attorney to the statements and, on appeal, the defendant claimed that when the prosecutor made these statements during the closing argument, the prosecutor knew the defendant had not testified, the time for the defendant to testify had passed, and testimony by the police officer established the defendant had been given his Miranda rights. He argued that the prosecutor's statement was reversible error

because it was made after he elected not to testify and implied criticism because he did not testify.

The court recognized that a fundamental principle of constitutional law is that a prosecutor may not comment on a defendant's failure to testify in a criminal case. A comment on the defendant's silence is improper, and violates of the Fifth and Fourteenth Amendments of the United States Constitution. Any such claim of a constitutional rights violation will be reviewed de novo. Argument by counsel must be limited to the facts and evidence and the inferences that properly flow from those facts. Generally, where a prosecutor's statement may have been improper, the appropriate remedy is a mistrial rather than dismissal. In this case, the defendant took the prosecutor's argument out of context. Rather than commenting on the defendant's failure to testify at trial or exercise a right to remain silent, the prosecutor's statement referred to the defendant's failure in his voluntary assertions to law enforcement before being given Miranda warnings to deny the drugs and drug paraphernalia were found in his motel room. The prosecutor's statement was a comment about the evidence, not a improper reference to the defendant's silence. The prosecutor's statement did not violate the defendant's constitutional rights. In addition, the district court instructed the jury to ignore the prosecutor's statement.

NEGLIGENT HOMICIDE - LEAVING THE SCENE OF AN ACCIDENT

In *State v. Jacob*, 2006 ND 246, 724 N.W.2d 118, the court affirmed the defendant's conviction of leaving the scene of an accident involving death.

The defendant, who had nearly 20 years of trucking experience, was driving a semi-tractor trailer when he stopped to see his brother at a Fargo tavern late on a Friday night. He parked the truck across the street from the bar and witnesses observed the defendant go into the bar and watched another person, obviously drunk, stagger about and eventually disappear behind the defendant's truck. The two witnesses testified that when the defendant emerged from the bar, having stayed inside only five minutes, he looked

toward the back of his truck and yelled something. One witness characterized it as an angry yell.

The defendant got into the truck and backed up. The defendant claimed that, when shifting, the truck was accidentally locked in reverse. The truck then left the parking lot and witnesses testified they saw a man lying in the parking lot where the truck had been parked. An autopsy revealed that the man had died from multiple blunt force injuries due to a pedestrian motor vehicle collision and that the man had a blood alcohol content of 0.42 percent. The defendant had also testified that he felt the trailer rock when he backed up and when he moved forward.

The defendant was charged with murder and leaving the scene of an accident involving death. The jury found the defendant not guilty of both murder and the lesser included offense of negligent homicide but guilty of leaving the scene offense. The defendant moved for a new trial contending that the evidence at trial was inconsistent with the verdicts. The motion was denied.

The defendant argued that, as a matter of law, there was no evidence to show he knew he had struck a person with his semi-tractor trailer. Because the defendant timely moved for an acquittal under N.D.R. Crim. P. 29, he preserved the issue of sufficiency of the evidence for appellate review.

The court noted that N.D.C.C. § 39-08-04, the offense of leaving the scene of an accident resulting in injury or death, imposed a culpability requirement of “negligence” in failing to comply with the performance of that section under circumstances involving death. Criminal negligence does not require that the defendant know that he hit a person. This is not the proper culpability standard provided for in N.D.C.C. § 39-08-04. The trial testimony supported the jury’s conclusion that the defendant acted negligently by leaving the scene of accident resulting in death.

The court also rejected the defendant’s argument that the jury verdict was inconsistent in finding him guilty of leaving the scene of an accident but not

guilty of negligent homicide because both require a negligence culpability.

A standard for reconciling a jury verdict is whether the verdict is legally inconsistent. Reconciliation of a verdict includes an examination of both the law of the case and the evidence in order to determine whether the verdict is logical and probable and thus consistent, or whether it is perverse and clearly contrary to the evidence.

The defendant was charged with and acquitted of both murder and the lesser included offense of negligent homicide. Negligent homicide and leaving the scene of an accident involving death both impose a culpability level of “negligence.” However, the conduct for each offense differs greatly. For negligent homicide, a person must act negligently, causing death. For leaving the scene involving death, a person need only negligently leave an accident scene where death occurred. The jury could have rationally found the defendant did not negligently cause the victim’s death but that the defendant acted negligently by leaving the scene of the accident where the victim died. This conclusion finds support from the defendant’s own testimony that he felt his trailer rock when he backed up to leave and again when he immediately drove forward to exit the lot. The jury could have rationally inferred the defendant was alerted to the likelihood of an accident at that moment. The jury could also have inferred that the defendant’s subsequent conduct reflected he was aware of the likelihood. The verdicts were not legally inconsistent.

SEARCH AND SEIZURE - INVESTIGATORY STOP

In *State v. Johnson*, 2006 ND 248, 724 N.W.2d 129, the court reversed the district court’s order denying the defendant’s motion to suppress evidence found after a motor vehicle stop.

An officer was parked on an approach along Interstate 94. The officer observed the defendant’s vehicle pass him, noting that it lacked a front license plate in violation of N.D.C.C. § 39-04-11. The officer drove onto the highway and caught up with the defendant’s vehicle. The vehicle had no rear license plate but did have a paper temporary registration sticker affixed to the back window. The officer testified it was difficult to see the sticker at the normal distance between the two vehicles and nothing about the sticker stuck out as unusual. He observed no other traffic violations. The officer initiated a traffic stop solely

to check the temporary sticker because of the officer’s belief many people drive beyond the 30 days allowed by the temporary registration.

When approaching the vehicle after the stop, the officer determined the defendant’s temporary registration was expired. The car’s driver, who was not the defendant, admitted his license was suspended and he was placed under arrest. Another officer arrived and searched the vehicle incident to the arrest. During the search, drugs and paraphernalia were found in the defendant’s purse.

After denial of her motion to suppress, the defendant argued on appeal that she did not lose her Fourth Amendments rights simply because her vehicle had a temporary registration sticker.

She further argued that a law enforcement officer's hunch that there may have been in violation of the vehicle registration statute was not enough to authorize a stop. The court agreed. The court rejected the state's argument that an officer's observation of a vehicle with a temporary registration sticker that did not "stick out" as unusual in any way, was enough, by itself, to provide a reasonable and articulable suspicion to stop defendant vehicle.

The reasonable suspicion standard is objective and based on the totality-of-the-circumstances. A mere hunch that illegal activity is taking place is not enough to justify the detention of a motorist. An investigative stop of a moving vehicle must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity and mere curiosity, suspicion, vague hunches, or other nonobjective facts will not suffice.

There was no evidence of erratic driving or speeding nor did the temporary registration sticker stick out as unusual. An officer's belief that many people may violate the 30-day temporary registration law was an over-generalization that did not give rise to a reasonable suspicion that the defendant's automobile was not lawfully registered. This case was different from *State v. Oliver*, 2006 ND 241, ____ N.W.2d ____, for an important reason: the officer in *Oliver* initiated the stop after observing a noticeably faded 30-day temporary registration sticker. In this case, the stop of the defendant's vehicle was not based on reasonable and articulable suspicion that a traffic violation was occurring simply because many people drive their vehicles beyond the 30 days allowed by the temporary registration statute. The evidence obtained during the search of the defendant's vehicle should have been suppressed.

PROBATION REVOCATION

In *State v. Wardner*, 2006 ND 256, ____ N.W.2d ____, the court affirmed the revocation of the defendant's probation after his conviction of gross sexual imposition.

The defendant pled guilty to gross sexual imposition with his four-year-old stepdaughter. The plea was a result of a written plea agreement and a presentence investigation was ordered by the district court.

After this presentence investigation, the court suspended execution of a seven year sentence and placed the defendant on supervised probation with outpatient sexual abuse treatment ordered at a human service center. The defendant began his treatment in August of 2001 and, in December of 2004, he was expelled from treatment program for mistreating the staff and disrupting group therapy sessions. At his revocation hearing, the defendant admitted the violation and a second presentence investigation was ordered.

After receipt of the second presentence investigation, the court again suspended execution of a seven-year sentence but added additional conditions including a requirement that any contacts with children be monitored in conjunction with a safety plan.

A few months after this order, the defendant again was subject to a revocation proceeding for

violating this additional conditions of probation, his probation was finally revoked, and the seven-year prison sentence was imposed.

The defendant claimed that the trial court should have ordered another presentence investigation and risk assessment before imposing the seven-year prison sentence after his second revocation proceeding.

A district court may order a presentence investigation and report at any time but is not required to do so. However, N.D.C.C. § 12.1-32-02(11) provides that before sentencing a defendant on a felony charge for gross sexual imposition, the court must order a presentence investigation that includes a risk assessment. The defendant claimed that the district court, upon revocation of probation and imposing the previously suspended seven-year prison term, was required to order a new presentence investigation and risk assessment before it revoked his probation.

The court noted that this statutory provision requires that a presentence investigation in cases of gross sexual imposition be conducted before sentencing. By definition, sentencing is prior to resentencing. In this case, a presentence investigation was conducted prior to sentencing, and the plain language of the statute was complied with. Some states require new or

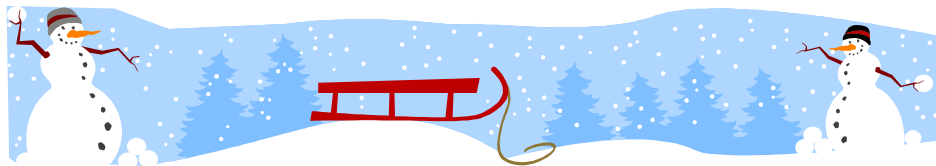
updated presentence investigations before resentencing but North Dakota has not chosen to do so.

The defendant also asserted that the condition requiring a safety plan before contact with children was ambiguous and created only an option available to the defendant.

Upon a review of the record, the court found that the defendant was fully aware of the conditions of his probation. Although due process protection applies, probation revocation, like a parole revocation, is not a stage of a criminal

prosecution. A probationer facing revocation has limited rights. The probationer is entitled to a written notice of the claimed violation of his probation, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, a neutral hearing body, and a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation.

The defendant was given fair notice of the proscribed conduct and the court's factual finding of a probation violation based upon the defendant's conduct was not clearly erroneous.



My staff and I wish each of you and your families a
happy and safe New Year.

Wayne Stenehjem

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